



1 January 20, 2010 (Tr. 36-101) and issued an unfavorable decision  
2 on October 12, 2010 (Tr. 16-28). The Appeals Council denied review  
3 on December 1, 2011 (Tr. 1-6), making the ALJ's decision the final  
4 decision of the Commissioner and appealable to the district court  
5 pursuant to 42 U.S.C. § 405(g). Myers filed this action for  
6 judicial review on January 20, 2012. ECF Nos. 2, 5.

#### 7 **STATEMENT OF FACTS**

8 The facts have been presented in the administrative hearing  
9 transcript, the ALJ's decision, and the briefs of the parties.  
10 They are only briefly summarized here.

11 Myers was 42 years old at onset (Tr. 27). He earned a GED,  
12 went to college for 1-2 years, and lives alone. He has past  
13 relevant work as a carpet installer and has owned a flooring  
14 business. Myers alleges physical limitations, primarily back pain  
15 and problems related to irritable bowel syndrome (IBS) (Tr. 27,  
16 68, 74, 87, 191, 770, 856).

#### 17 **SEQUENTIAL EVALUATION PROCESS**

18 The Social Security Act (the Act) defines disability as the  
19 "inability to engage in any substantial gainful activity by reason  
20 of any medically determinable physical or mental impairment which  
21 can be expected to result in death or which has lasted or can be  
22 expected to last for a continuous period of not less than twelve  
23 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
24 provides that a plaintiff shall be determined to be under a  
25 disability only if any impairments are of such severity that a  
26 plaintiff is not only unable to do previous work but cannot,  
27 considering plaintiff's age, education and work experiences,  
28 engage in any other substantial gainful work which exists in the

1 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
2 Thus, the definition of disability consists of both medical and  
3 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
4 (9<sup>th</sup> Cir. 2001).

5 The Commissioner has established a five-step sequential  
6 evaluation process for determining whether a person is disabled.  
7 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
8 is engaged in substantial gainful activities. If so, benefits are  
9 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
10 the decision maker proceeds to step two, which determines whether  
11 plaintiff has a medically severe impairment or combination of  
12 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

13 If plaintiff does not have a severe impairment or combination  
14 of impairments, the disability claim is denied. If the impairment  
15 is severe, the evaluation proceeds to the third step, which  
16 compares plaintiff's impairment with a number of listed  
17 impairments acknowledged by the Commissioner to be so severe as to  
18 preclude substantial gainful activity. 20 C.F.R. §§  
19 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P  
20 App. 1. If the impairment meets or equals one of the listed  
21 impairments, plaintiff is conclusively presumed to be disabled.  
22 If the impairment is not one conclusively presumed to be  
23 disabling, the evaluation proceeds to the fourth step, which  
24 determines whether the impairment prevents plaintiff from  
25 performing work which was performed in the past. If a plaintiff is  
26 able to perform previous work, that plaintiff is deemed not  
27 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
28 this step, plaintiff's residual functional capacity (RFC) is

1 considered. If plaintiff cannot perform past relevant work, the  
2 fifth and final step in the process determines whether plaintiff  
3 is able to perform other work in the national economy in view of  
4 plaintiff's residual functional capacity, age, education and past  
5 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);  
6 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

7 The initial burden of proof rests upon plaintiff to establish  
8 a *prima facie* case of entitlement to disability benefits.

9 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
10 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
11 met once plaintiff establishes that a physical or mental  
12 impairment prevents the performance of previous work. The burden  
13 then shifts, at step five, to the Commissioner to show that (1)  
14 plaintiff can perform other substantial gainful activity and (2) a  
15 "significant number of jobs exist in the national economy" which  
16 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
17 Cir. 1984).

#### 18 STANDARD OF REVIEW

19 Congress has provided a limited scope of judicial review of a  
20 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
21 the Commissioner's decision, made through an ALJ, when the  
22 determination is not based on legal error and is supported by  
23 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
24 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
25 "The [Commissioner's] determination that a plaintiff is not  
26 disabled will be upheld if the findings of fact are supported by  
27 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
28 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is

1 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
2 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
3 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989).  
4 Substantial evidence "means such evidence as a reasonable mind  
5 might accept as adequate to support a conclusion." *Richardson v.*  
6 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch  
7 inferences and conclusions as the [Commissioner] may reasonably  
8 draw from the evidence" will also be upheld. *Mark v. Celebrezze*,  
9 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers  
10 the record as a whole, not just the evidence supporting the  
11 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22  
12 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup>  
13 Cir. 1980)).

14 It is the role of the trier of fact, not this Court, to  
15 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
16 evidence supports more than one rational interpretation, the Court  
17 may not substitute its judgment for that of the Commissioner.  
18 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
19 Cir. 1984). Nevertheless, a decision supported by substantial  
20 evidence will still be set aside if the proper legal standards  
21 were not applied in weighing the evidence and making the decision.  
22 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
23 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
24 support the administrative findings, or if there is conflicting  
25 evidence that will support a finding of either disability or  
26 nondisability, the finding of the Commissioner is conclusive.  
27 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

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**ALJ'S FINDINGS**

At step one, ALJ Payne found Myers did not engage in substantial gainful activity after onset (Tr. 18). At steps two and three, he found Myers suffers from degenerative disc disease (thoracic spine), degenerative changes of the cervical and lumbar spines and irritable bowel syndrome (IBS), impairments that are severe but do not meet or medically equal a Listed impairment (Tr. 18, 21).

The ALJ found Myers less than fully credible and assessed an RFC for the full range of light work (Tr. 22-23). At step four the ALJ found Myers is unable to perform any past relevant work (Tr. 27). At step five, relying on the Medical-Vocational Guidelines ("Grids"), the ALJ found Myers is not disabled (Tr. 27-28).

Accordingly, the ALJ concluded Myers was not disabled as defined by the Act from January 29, 2009 (onset) through October 12, 2010 (the date of the decision).

**ISSUES**

Myers alleges the ALJ erred when he assessed credibility, weighed the medical evidence and relied on the Grids at step five. ECF No. 21 at 7-11.

**DISCUSSION****A. Credibility**

Myers alleges the ALJ erred when he assessed his credibility. ECF No. 21 at 7-10. The Commissioner responds that the ALJ's reasons were clear, convincing and supported by substantial evidence. ECF No. 23 at 6-12.

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.

1 1995). However, the ALJ's findings must be supported by specific  
2 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
3 1990). Once the claimant produces medical evidence of an  
4 underlying medical impairment, the ALJ may not discredit testimony  
5 as to the severity of an impairment because it is unsupported by  
6 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
7 1998). Absent affirmative evidence of malingering, the ALJ's  
8 reasons for rejecting the claimant's testimony must be "clear and  
9 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).  
10 "General findings are insufficient: rather the ALJ must identify  
11 what testimony is not credible and what evidence undermines the  
12 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
13 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

14 The ALJ found Myers's medically determinable impairments  
15 could reasonably be expected to cause the alleged symptoms, but  
16 his statements concerning the intensity, persistence and limiting  
17 effects of the symptoms were not credible to the extent they were  
18 inconsistent with the ALJ's RFC assessment (Tr. 22-27).

19 The ALJ relied on inconsistent statements, failure to follow  
20 prescribed treatment, exaggeration of symptoms and limitations,  
21 and lack of supporting objective evidence (Tr. 22-27).

22 On October 1, 2009, Myers reported to the ER he was still  
23 pursuing physical therapy (Tr. 653). As the ALJ observes, a report  
24 shows dated September 10, 2009, states Myers was discharged from  
25 physical therapy (Tr. 25, 340). Inconsistent statements diminish  
26 credibility. *Thomas v. Barnhart*, 278 F.3d 947(9<sup>th</sup> Cir. 2002).

27 The ALJ notes PT records indicate Myers was "fairly  
28 inconsistent" with his appointments (Tr. 25, 340). Noncompliance

1 with medical care or unexplained or inadequately explained reasons  
2 for failing to seek medical treatment cast doubt on a claimant's  
3 subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v.*  
4 *Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989).

5 ER records in February 2009 (shortly after onset) show Myers  
6 describes pain as "10 out of 10," yet appears in little distress.  
7 When distracted he rises without much evidence of discomfort (Tr.  
8 306-07). The ALJ notes Myers told treating physician Phillip  
9 Woolf, M.D., on September 1, 2009 that an assistant at the  
10 hospital told him after looking at his reports that Myers has  
11 degenerative disc disease (DDD) and that "if he lifted more than 5  
12 pounds he could be paralyzed." Yet the hospital records on August  
13 29, 2009 actually state Myers was advised to refrain from any  
14 heavy lifting greater than 5 to 10 pounds at that time. Paralysis  
15 is not mentioned. (Tr. 25, 317, 597). Over-reporting or  
16 exaggerating cast doubt on credibility. *Tonapetyan v. Haller*, 242  
17 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2001).

18 In November 2009, about eleven months after onset, examining  
19 doctor Cynthia Hahn, M.D., notes Myers groaned and exhibited pain  
20 behavior. She opined the cervical spine and MRI scan in no way  
21 account for the degree of Myers's complaints of back and neck  
22 pain. The ALJ observes Dr. Hahn opined Myers could return to his  
23 previous job and avoid long-term narcotics (Tr. 25, 394-96). The  
24 ALJ may properly rely on allegations inconsistent with objective  
25 medical evidence when weighing credibility, as long as it is not  
26 the sole reason. *Thomas*, 278 F.3d at 959.

27 After review the court finds the ALJ's reasons for  
28 discounting plaintiff's subjective complaints are clear,



1 convincing, and fully supported by the record. Accordingly, the  
2 ALJ correctly found Myers's subjective descriptions of his  
3 functional limitations were not fully credible.

4 **B. Medical evidence**

5 Myers alleges the ALJ failed to properly weigh the opinion  
6 of testifying expert Sterling Moore, M.D., that Myers is limited  
7 to "occasional stooping and the need to be near a bathroom due to  
8 Mr. Myers' frequent bowel movements." ECF No. 21 at 10-11, citing  
9 Tr. 49. The Commissioner does not directly answer this allegation.

10 The record is not as clear as Myers alleges. Later in the  
11 hearing Dr. Moore indicated he was unable to say definitively  
12 Myers requires close access to a bathroom while working (Tr. 57).  
13 He opined Myers has two non-exertional limitations: occasional  
14 crouching and stooping (Tr. 60). Given this testimony the ALJ was  
15 not required to incorporate the need to be near a bathroom in the  
16 RFC.

17 The ALJ assessed an RFC for the full range of light work (Tr.  
18 22). Whether the ALJ should have included occasional stooping and  
19 crouching as non-exertional limitations in the RFC is discussed  
20 below.

21 **C. Step five**

22 Myers alleges the ALJ should have called a vocational expert  
23 instead of relying on the Grids at step five. ECF No. 21 at 10-11.  
24 He alleges the ALJ erred when he failed to include limitations  
25 assessed by Dr. Moore in the RFC, and had these limitations been  
26 included, a vocational expert's testimony was needed. ECF No. 21  
27 at 10. The Commissioner responds that, because additional non-  
28 exertional limitations do not significantly limit Myers's

1 exertional ability, the ALJ correctly relied on the Grids. ECF No.  
2 23 at 14-17. The Commissioner does not directly address Myers's  
3 contention that the ALJ erred by failing to adopt or discuss the  
4 medical expert's assessed non-exertional limitations, other than  
5 to point out the ALJ's statement that the evidence of IBS "fails  
6 to demonstrate that Plaintiff was totally disabled." ECF No. 23 at  
7 10, citing Tr. 23.

8 The ALJ states "the types of exertional and non-exertional  
9 limitations that are present in this case ... would not  
10 significantly erode the job base at the sedentary and light job  
11 levels." (Tr. 28), citing to SSR 96-9p, SSR 85-15, SSR 83-10 and  
12 SSR 83-14.

13 The ALJ is correct. SSR 83-14 provides:

14 "... to perform substantially all of the exertional  
15 requirements of most sedentary and light jobs, a person would not  
16 need to crouch, and would need to stoop only occasionally (from  
17 very little up to one-third of the time, depending on the  
18 particular job)."

19 SSR 83-14.

20 Even if the ALJ had explicitly adopted these non-exertional  
21 limitations endorsed by Dr. Moore, the job base clearly would not  
22 have been significantly eroded. The error if any is clearly  
23 harmless.

24 As noted, Dr. Moore later backed off from requiring restroom  
25 proximity in the RFC. The remainder of Myers's allegation is that  
26 the ALJ should have adopted the limitation because it was based on  
27 Myers's testimony. As indicated, the ALJ properly found Myers less  
28 than credible. Consequently the ALJ was not required to include

1 the limitation.

2 Myers alleges the ALJ should have called a vocational expert  
3 instead of relying on the Grids.

4 Myers is mistaken.

5 Once a claimant has established that he or she suffers from a  
6 severe impairment that prevents the claimant from doing any past  
7 relevant work, the claimant has made a prima facie showing of  
8 disability. At this point - step five - the burden shifts to the  
9 Commissioner to show that the claimant can perform some other work  
10 that exists in "significant numbers" in the national economy,  
11 taking into consideration the claimant's residual functional  
12 capacity, age, education and work experience. 20 C.F.R. § 404.1560  
13 (b)(3). There are two ways for the Commissioner to meet the burden  
14 of showing that there is other work in "significant numbers" in  
15 the national economy that claimant can perform: (a) by the  
16 testimony of a vocational expert, or (b) by reference to the  
17 Medical-Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app.  
18 2 ("Grids"). *Tackett v. Apfel*, 180 F.3d 1094, 1100-1101 (9<sup>th</sup> Cir.  
19 1999).

20 At step five the ALJ can call upon a vocational expert to  
21 testify as to: (1) what jobs the claimant, given his or her  
22 residual functional capacity, would be able to do; and (2) the  
23 availability of such jobs in the national economy. In some cases,  
24 it is appropriate for the ALJ to rely on the Grids to determine  
25 whether a claimant can perform some work that exists in  
26 "significant numbers" in the national economy. The Grids are a  
27 matrix system for handling claims that involve substantially  
28 uniform levels of impairment. See 20 C.F.R. pt. 404, subpt. P,

1 app. 2.

2 The Commissioner's need for efficiency justifies use of the  
3 Grids at step five where they completely and accurately represent  
4 a claimant's limitations. See *Heckler v. Campbell*, 461 U.S. 458,  
5 461 (1983). A non-exertional impairment, if sufficiently severe,  
6 may limit the claimant's functional capacity in ways not  
7 contemplated by the Grids. In such a case, the guidelines would be  
8 inapplicable. Examples of non-exertional limitations are pain,  
9 postural limitations, or environment limitations. See *Desrosiers*  
10 *v. Secretary of Health and Human Servs.*, 846 F.2d 573, 577  
11 (Pregerson, J., concurring)(9<sup>th</sup> Cir. 1988)(internal citations  
12 omitted).

13 At step five in the instant case, the ALJ concluded that  
14 Meyers's limitations were adequately covered by the Grids. As  
15 noted, Dr. Moore opined Myers is limited to occasional stooping  
16 and crouching (Tr. 60). These non-exertional limitations do not  
17 significantly erode the base of sedentary and light jobs. See SSR  
18 83-14. Accordingly, the ALJ appropriately relied on the Grids and  
19 was not required to call upon a vocational expert to testify.

#### 20 CONCLUSION

21 Having reviewed the record and the ALJ's conclusions, this  
22 court finds that the ALJ's decision is free of harmful error and  
23 supported by substantial evidence. Accordingly,

#### 24 IT IS HEREBY ORDERED:

25 1. Defendant's Motion for Summary Judgment, **ECF No. 22**, is  
26 **GRANTED**.

27 2. Plaintiff's Motion for Summary Judgment, **ECF No. 20**, is  
28 **DENIED**.

1       **IT IS SO ORDERED.** The District Court Executive is directed to  
2 file this Order, provide copies to the parties, enter judgment in  
3 favor of Defendant, and **CLOSE** this file.

4       DATED this 29th day of May, 2013.

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6                               S/James P. Hutton

7                               JAMES P. HUTTON

8                               UNITED STATES MAGISTRATE JUDGE  
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